88-742

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 88-_____

JOHN VONHOF, LARRY BELL, and
DONALD NOLL,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The State accepts sections 2 and 3 of Defendants' Statement of the Case, but not section 1 entitled "The Search".

On April 7, 1988 Ferry County Assessor's Appraiser Brian Royer made a revaluation visit to the VonHof/Bell property located in Ferry County. Mr. Royer passed through two gates to reach their property. The first gate was not on their property and he was given a key by the owner of the first gate. The second gate, located on the VonHof/Bell property, was unlocked and wide open. He passed a number of No Trespassing signs as he entered onto the VonHof/Bell property.

Mr. Royer drove up the driveway, parked, knocked at the residence, and shouted, but no one answered. He then checked the exteriors of the residence and a shop located 60 yards downhill from the residence. The shop was not on the tax rolls and had never been appraised. He walked off the dimensions of

the shop knocked on the side of the building and noticed that the doors on the North side of the shop were wide open. As he stood near the shop, he noticed the strong odor of marijuana. Standing six to seven feet from the open doors, he again hollered and asked if anybody was around. He then left. The visit took 10 - 15 minutes and was made at about 1:00 p.m. on a weekday. At no time did Mr. Royer enter the residence or shop.

Defendants Noll and Bell were not present on the property when visited, or the next day when searched by the Ferry County Sheriff. Defendant Noll had no interest in the property. Defendant VonHof was present on the property when searched by the Sheriff. He had owned real property elsewhere in Washington, paid real property taxes in Washington and understood that real property values are periodically revaluated. Further, he assumed his property in Ferry County would be visited. None of the defendants had

expressly instructed the Assessor to not visit the property. The defendants' property was visited from time to time by neighbors, friends and contractors. They too would use the driveway, pass the shop located next to the driveway, and go to the residence.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS OF THE STATE COURTS BELOW ARE NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE LANGUAGE AND INTENT OF THE FOURTH AMENDMENT.

A. The Defendants argue that the Court of Appeals decision is in conflict with See v. Seattle, 387 U.S. 541 (1967). No conflict exists for two reasons. First, unlike the present case, See arose in a criminal context in that it reviewed a Seattle Fire Code Ordinance which made it a crime to not allow the fire marshal to inspect buildings and premises. Second, Mr. Royer's revaluation visit is clearly within the holding of Wyman v. James, 400 U.S. 309 (1971) in that the Defendants could have expressly forbade the

revaluation visit with the only consequence being a less accurate value assessment.

B. The Defendants also argue that the Court of Appeals decision is in conflict with GM Leasing Corp. v. United States, 429 U.S. 338 (1977). This argument also fails. In GM Leasing, I.R.S. agents made two warrantless forced entries into a taxpayer's cottage type office and seized books, records and other property. In the present case the Defendants' residence and shop were at no time entered and no seizures were made by Mr. Royer.

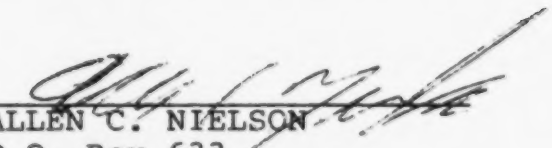
C. The Defendants ignore a seperate and distinct line of decisions that are consistent with the Court of Appeals decision. The Court of Appeals held that Mr. Royer's revaluation visit came within the holding of State v. Seagull, 95 Wn. 2d 898, 632 P. 2d 44 (1981). The Defendants do not argue to the contrary. The holding in Seagull is in turn based on Katz v. United

States, 389 U.S. 347 (1971), United States v. Vilhotti, 323 F. Supp. 425 (S.D.N.Y.), aff'd in part and rev'd in part, 425 F. 2d 1186 [2d Cir. (1971)], cert. denied, 406 U.S. 947 (1972) and Ker v. California, 374 U.S. 23 (1963). These decisions are all contrary to the fixed formula proposed by the Defendants, namely all entries onto private property are unreasonable searches, unless based on proper consent, or a valid search warrant. Rather they hold that what is reasonable must be based on the facts and circumstances of each case. Thus in Vilhotti, an F.B.I. agent, while standing in the service area abutting a garage, used a flashlight to peer between boards covering a rear window on the garage. He observed stolen property. That court reviewed the facts and circumstances and held such a window search permissible. The facts and analysis there are much the same as the facts and analysis used by the Court of Appeals in the present case.

CONCLUSION

The Petition should be denied.

Respectfully submitted,



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November 22, 1988.